

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BRIAN ODELL HOPSON,
Petitioner.

No. 2 CA-CR 2013-0328-PR
Filed December 9, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24

Appeal from the Superior Court in Maricopa County
Nos. CR2005048697001DT; CR2006008123001DT; CR2009120677001DT
The Honorable Rosa Mroz, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant, Deputy County Attorney, Phoenix
Counsel for Respondent

Brian O. Hopson, Tucson
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez concurred and Judge Miller specially concurred.

H O W A R D, Chief Judge:

¶1 After a jury trial, petitioner Brian Hopson was convicted of four counts of aggravated assault. The trial court imposed concurrent, maximum sentences of twenty years, to be served consecutively to the sentences in two other matters. Hopson then filed an appeal and initiated his first post-conviction proceeding, filed pursuant to Rule 32, Ariz. R. Crim. P. In a February 2011 ruling, filed while Hopson’s appeal was pending, the court dismissed his post-conviction proceeding but granted him “leave to re-file at any time within 30 days following the issuance of the order and mandate on direct appeal, pursuant to Rule 32.4(a), [Ariz. R. Crim. P.]”¹ See Ariz. R. Crim. P. 32.4(a) (defendant required to file notice of post-conviction relief “within thirty days after the issuance of the order and mandate in the direct appeal”).

¶2 Pursuant to Hopson’s request, we dismissed his appeal on August 8, 2011.² *State v. Hopson*, Nos. 1 CA-CR 10-0397, 1 CA-CR 10-0398, 1 CA-CR 10-0399 (consolidated) (order filed Aug. 8, 2011). In a letter dated September 9, 2011, Hopson’s appellate attorney, Stephen Collins, notified him the court of appeals had dismissed his

¹The trial court entered a similar order in May 2011 in response to Hopson’s subsequent attempts to initiate Rule 32 proceedings.

²The August 8, 2011, order of dismissal served as the order and mandate in this matter.

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appeal on August 8, 2011.³ Waiving the assistance of counsel, Hopson filed a pro se notice of post-conviction relief on September 22, 2011.

¶3 On the form Hopson used for his notice of post-conviction relief, he stated he was raising claims of ineffective assistance of counsel; checked the spaces indicating he was seeking relief based on newly discovered evidence and actual innocence under Rule 32.1(e) and (h); and also indicated that his untimely filing was through no fault of his own based on Rule 32.1(f). In a memorandum in support of the notice of post-conviction relief, Hopson explained his untimely filing by stating Collins had not notified him his appeal had been dismissed until September 9, 2011, more than thirty days after the dismissal order was filed.

¶4 In a September 2011 ruling, the trial court concluded that Hopson's notice of post-conviction relief was untimely, but found he had "sufficiently raised a colorable claim to permit this Rule 32 proceeding to move forward," and thus permitted him to file a petition for post-conviction relief. However, the court also explained that its ruling did "not constitute any expression of opinion on the merits of any of defendant's substantive claims, or that any claims raised in the petition are not procedurally precluded." Hopson filed a pro se petition for post-conviction relief in December 2011 asserting, inter alia, claims of ineffective assistance of trial, appellate, and Rule 32 counsel, and a claim of "[p]ossibly newly discovered evidence."

¶5 In its April 2012 ruling summarily dismissing Hopson's petition, the trial court "agree[d] with the arguments set forth in the State's Response" to the petition, and further found "that there are no colorable claims for ineffective assistance of advisory counsel." In its response, the state had argued Hopson's notice of post-conviction relief should be dismissed as untimely; Rule 32.1(f) does

³According to the inmate mail log Hopson attached to his notice of post-conviction relief, he did not receive Collins's letter until September 16, 2011.

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not apply to non-pleading defendants like Hopson; and, focusing solely on Hopson's claims of ineffective assistance of counsel, the state asserted the "claims are all precluded."

¶6 We will not disturb the trial court's ruling absent an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). For the reasons set forth below, we find no abuse here. Rule 32.2(b), the rule of preclusion, is consistent with Rule 32.4, and states that when a defendant files a successive or untimely notice of post-conviction relief and wants to raise a claim under one of the subsections excepted from the rule of preclusion,

the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.

¶7 A defendant who fails to file a notice of post-conviction relief within the time limits set forth in Rule 32.4 may raise only claims that are cognizable under Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a). And, because his notice was untimely, Hopson was required to establish that the untimeliness was not his fault before asserting any claims. *See* Ariz. R. Crim. P. 32.2(b). And assuming the court accepted Hopson's explanation for his untimely filing, to wit, that Collins had notified him his appeal had been dismissed more than thirty days after that event had occurred, it was then required to address the merits of the claims falling within the exception to the rule of preclusion. *Id.*

¶8 Before we address the claims Hopson expressly raises on review, we note that he acknowledged in his motion for rehearing that he had "abandoned" his claim based on Rule 32.1(f). In any event, because Rule 32.1(f) is not available to Hopson, a non-

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pleading defendant who already had an appeal, the trial court did not abuse its discretion in refusing to grant relief on this ground. *See* Ariz. R. Crim. P. 32.1(f).

¶9 On review, Hopson asserts Collins did not provide him with timely notice his appeal had been dismissed, and maintains the trial court erred by dismissing his claims of ineffective assistance of trial, appellate, and Rule 32 counsel, actual innocence, and newly discovered evidence. Hopson also asserts the court's dismissal of his claim of ineffective assistance of advisory counsel is "mis[]placed," and the state's response, which the court essentially adopted, failed to acknowledge that he had raised claims based on "possibly" newly-discovered evidence and actual innocence pursuant Rule 32.1(e) and (h). We address each of Hopson's claims in turn.

¶10 First, Hopson's claims of ineffective assistance of counsel fall under Rule 32.1(a). *See State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d 637, 641 (App. 2010). Consequently, he was barred from raising these claims in an untimely post-conviction proceeding. *See* Ariz. R. Crim. P. 32.4. As we stated in *State v. Rosales*, 205 Ariz. 86, ¶ 11, 66 P.3d 1263, 1267 (App. 2003), with respect to claims under Rule 32.1(a) through (c), "no exception to the preclusion or timeliness rules exists." Accordingly, the trial court did not err when it denied relief summarily on Hopson's claims of ineffective assistance of trial and appellate counsel.

¶11 Nor did the trial court err in summarily rejecting his claim of ineffective assistance of Rule 32 counsel. "[T]he non-pleading defendant has 'no constitutional right to counsel or effective assistance in post-conviction proceedings'; although the non-pleading defendant has the right to effective representation on appeal, he has no 'valid, substantive claim under Rule 32' for 'ineffective assistance on a [prior-post-conviction relief] petition.'" *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011) (alteration in *Osterkamp*), quoting *State v. Krum*, 183 Ariz. 288, 292 & n.5, 903 P.2d 596, 600 & n.5 (1995).

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¶12 Next, in regard to Hopson’s claim of actual innocence, we note that he did not raise this claim in his petition for post-conviction relief or the amendment thereto. As such, we will not consider it on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (reviewing court will not consider for first time on review issues not presented to, or ruled on, by trial court). In any event, Hopson appears to have couched his claim of actual innocence on review within the context of ineffective assistance of counsel, a claim the trial court properly dismissed for the reasons set forth above.

¶13 Implicit in the trial court’s blanket adoption of the state’s response to the petition for post-conviction relief is its failure to acknowledge Hopson’s claim based on “possibly” newly discovered evidence, one that was not otherwise precluded under Rule 32.2(b). However, to be entitled to a claim of newly discovered evidence, a petitioner first must demonstrate the evidence is newly discovered. *See State v. Serna*, 167 Ariz. 373, 374, 807 P.2d 1109, 1110 (1991) (describing five elements of successful newly discovered evidence claim). Here, Hopson has failed to provide any argument to support a claim of newly discovered evidence or to explain why the court should have provided relief on this ground. *See Ariz. R. Crim. P. 32.9(c)(1)(iv)*. We thus conclude the court properly dismissed his petition even though it failed to expressly consider this claim. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will sustain trial court if “correct for any reason”).

¶14 For all of these reasons, we grant review but deny relief.

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MILLER, Judge, specially concurring:

¶15 I write separately to indicate that although I agree with the ultimate result in this case, I do not agree that Hopson's ineffective assistance claims pertaining to trial and appellate counsel must be dismissed as untimely.

¶16 Hopson was notified by appellate counsel in a letter dated September 9, 2011 that the Court of Appeals had dismissed his appeal 32 days earlier. In this circumstance, it was impossible for Hopson to comply with the trial court's February 24, 2011 order granting leave to file a Rule 32 petition "within 30 days following the issuance of [a dismissal order]." For the same reason, he could not comply with the time limit in Rule 32.4(a), although he did file his Notice of Post-Conviction Relief within thirty days of receiving the letter and dismissal order.

¶17 The state argued, and the trial court agreed, that the thirty-day deadline precluded consideration of Rule 32.1(a) claims because Hopson was a non-pleading defendant. The state did not address the impossibility of compliance or the exclusionary effect on Hopson's right to judicial review of his claims of ineffective assistance of counsel based on *Strickland v. Washington*, 466 U.S. 668 (1984). Moreover, it would be improper to apply a rule of procedure in such a manner to countenance a constitutional violation. See *Chambers v. Mississippi*, 410 U.S. 284, 296-98, 302-03 (1973) (state evidentiary rule cannot override accused's exercise of constitutional rights); *State v. Machado*, 224 Ariz. 343, ¶ 13, 230 P.3d 1158, 1166-67 (App. 2010), *aff'd*, 226 Ariz. 281, 246 P.3d 632 (2011). For these reasons, I believe the trial court should have considered Hopson's ineffective assistance claims.

¶18 But I nonetheless concur with my colleagues' decision because, even had the trial court considered the claims of ineffective assistance of counsel, the result would have been the same. Hopson was required in his petition to establish counsel's performance was objectively unreasonable based on applicable professional standards. See *State v. Febles*, 210 Ariz. 589, ¶ 18, 115 P.3d 629, 635 (App. 2005). Such a showing required supporting "[a]ffidavits,

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records, or other evidence.” See Ariz. R. Crim. P. 32.5. Mere assertions of error are insufficient to sustain his burden of demonstrating the first requirement of the *Strickland* test. See *State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim “must consist of more than conclusory assertions”). Hopson’s petition lacked affidavits or other evidence. At most, Hopson asserted personal, subjective claims, such as that his trial attorney failed to accept his requests regarding which witnesses to call, evidence to proffer, cross-examination, and motions to file. These are tactical matters in which attorneys have considerable leeway and, correspondingly, a defendant must show based on objective standards that counsel acted unreasonably. *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985) (attorneys have freedom to make tactical decisions without challenge by hindsight). Hopson’s petition did not meet the threshold burden of establishing a colorable *Strickland* claim.

¶19 As to Hopson’s remaining claims, I agree with the majority’s reasoning and conclusions.